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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 127

STANDARD LIME AND STONE COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 45–53) was issued on May 11, 1943, and has not yet been reported. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 1–4, 5–17) are reported in 57 N. L. R. B. 227. The decisions of the Board in prior representation proceedings, which form part of the record in this case (R. 27–39), are reported in 48 N. L. R. B. 424 and 50 N. L. R. B. 34.

JURISDICTION

The decree of the court below was entered on May 11, 1945 (R. 53–54). The petition for a writ of certiorari was filed on June 13, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether the Board may properly certify a labor organization as collective bargaining representative of the employees in an appropriate unit on the basis of an election in which less than a majority of the employees in the unit cast ballots.[1]

2. Whether, when the Board conducts an election to determine whether the employees in an appropriate unit desire to be represented by one of two labor organizations, or by neither of them, and the election results in no choice on the ballot receiving a majority of the votes cast but with the choice "neither" receiving fewer votes than either of the labor organizations, the Board may, in the exercise of its administrative discretion in

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[1] We believe that the second question urged by petitioner, namely, whether the Board, before certifying a labor organization on the basis of an election in which less than a majority of eligibles participated, must "have before it additional evidence sufficient to justify a finding that the majority vote was, in fact, truly representative" (Pet. 3) is not a separate question but is disposed of by the answer to the first question.

conducting a run-off election, omit the choice "neither" from the ballot.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (49 Stat. 449, 29 U. S. C. Sec. 151 *et seq.*) are set forth in the Appendix to the petition for writ of certiorari, pp. 21–24.

STATEMENT

In a proceeding under Section 9 (c) of the Act instituted by the filing of a petition by the UMW [2] for the investigation and certification of representatives the Board held a hearing in which petitioner, the UMW, and the Union [3] participated (R. 20). Thereafter the Board issued a decision and direction of election among petitioner's maintenance and production employees, who it found constituted an appropriate bargaining unit (R. 27–33). In the election, held on April 13, 1943, the employees were given opportunity to vote for the Union, for the UMW, or for "neither" (R. 20, 34). The results of the election were inconclusive. Of 439 employees eligible to vote, 218 cast ballots, of which 99 were for the Union, 62 for the UMW, and 57 for "neither" (R. 20, 34). Thereafter the Board's Regional Director issued

[2] United Construction Workers, Division of District 50, United Mine Workers of America, Local 202.

[3] United Cement, Lime and Gypsum Workers International Union, A. F. of L.

a report on the election recommending that the petition for certification be dismissed unless within 10 days one of the two labor organizations requested a run-off election (R. 21). Petitioner filed exceptions to the recommendation with respect to a run-off election and moved that the petition be dismissed (R. 21). Both the Union and the UMW duly requested that a run-off election be held (*id.*). On April 28, 1943, the Board issued a Supplemental Decision and Second Direction of Election, overruling petitioner's motion and directing a run-off election between the Union and the UMW (R. 21, 34–36). The run-off election was held on May 13, 1943. Of the 409 employees eligible to vote in the run-off election 166 cast ballots, of which 137 were for the Union, 28 were for the UMW, and 1 was void (R. 22, 37). Thereafter the Regional Director issued a report on the run-off election in which he recommended that the Board certify the Union as the statutory representative of petitioner's employees in the above-described unit (R. 22, 37; Bd. Exh. 2–AA). Petitioned filed objections to the Regional Director's report and to the recommendation with respect to certification of the Union on the ground that a majority of the eligible employees in the unit had not participated in either election (R. 23; Bd. Exh. 2–EE). On June 1, 1943, the Board issued a Supplemental Decision and Certification of Representatives in which it overruled petitioner's objections and certified the Union as the exclusive

bargaining representative of the employees within the unit found to be appropriate (R. 37–39; 50 N. L. R. B. 34).

Thereafter petitioner refused to bargain with the Union upon request (R. 23–24) and the Board, in a proceeding under Section 10 (c) of the Act, issued a decision in which it found that petitioner's refusal to bargain constituted a violation of Section 8 (5) and (1) of the Act (R. 1–3, 5–16), and an order requiring petitioner to cease and desist from its unfair labor practices, upon request to bargain with the Union, and to post appropriate notices (R. 3–4).

Thereafter the Board filed in the court below a petition for enforcement of its order (R. 41–44), and on May 11, 1944, the court handed down its opinion and entered its decree enforcing the order (R. 45–54).

ARGUMENT

1. Petitioner's contention that the Board could not validly certify the Union upon the basis of elections in which less than a majority of the eligible employees participated is without merit. The legislative history of the Act and the uniform decisions of the courts are to the contrary, and this Court declined to review precisely this question in *Central Dispensary and Emergency Hospital* v. *National Labor Relations Board*, No. 819, last Term, certiorari denied February 26, 1945.

Congress in providing in Section 9 (a) of the Act, that "Representatives designated or selected * * * by the majority of the employees" in an appropriate unit "shall be the exclusive representatives of all the employees * * * for the purposes of collective bargaining * * *", clearly intended the selection of such representatives to be determined, as in political elections, by the majority vote of those participating in the selection. Prior to the passage of the Act Congress had adopted this principle in the Railway Labor Act.[4] That Congress intended to incorporate the same principle in the National Labor Relations Act is clear from the Report of the House Committee on Labor on the bill which became the Act. The Report stated that "the bill is merely an amplification and further clarification of the principles enacted into law by the Railway Labor Act and by section 7 (a) of the National Industrial Recovery Act, with the addition of enforcement machinery of familiar pattern."[5] Peti-

[4] Section 2, Fourth, of the Railway Labor Act (45 U. S. C., Sec. 152 (4)) provides, in part: "The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act." The Report of the Senate Committee on Interstate Commerce which accompanied the bill stated that "the bill specifically provides that the choice of representatives of any craft shall be determined *by a majority of the employees voting on the question*," (italics supplied). Report No. 1065, 73rd Cong., 2nd Sess., p. 2.

[5] House Report No. 1147, 74th Cong., 1st Sess., p. 3.

tioner's contention (Br. pp. 9–11) that since Section 9 (a) of the National Labor Relations Act is worded differently from Section 2, Fourth, of the Railway Labor Act the two statutes cannot be construed as contemplating the same principle with respect to the requirement of majority participation in elections, is not only in the teeth of all the judicial authority on the point (*infra*, pp. 8–9) but on its face is unsupportable in view of the statement of the House Committee quoted above (*supra*, p. 6) and the indications elsewhere in the Reports of both the House and Senate Committees that the National Labor Relations Act was intended to incorporate the familiar majority rule principle long sanctioned by "governmental practices" and "democratic institutions." Senate Report No. 573, 74th Cong., 1st Sess., p. 13; House Report No. 1147, 74th Cong., 1st Sess., pp. 21–22.[6]

As the court below correctly held (R. 46–47), this Court supplied the "conclusive answer" to the question of majority participation in elections of employee representatives in *Virginian*

[6] These expressions of congressional intent clearly constitute a rejection of the quorum rule or "corporate stockholders' election" analogy advanced by petitioner (Pet. 7–8). The latter analogy, moreover, as the court below noted (R. 49–50), does not support petitioner's contention, in any event, since the general rule with respect thereto is that where an act is "to be performed by the constituent members of the corporation" the political rule applies, i. e. "a majority of those who appear may act." *Morrill* v. *Little Falls Mfg. Co.*, 53 Minn. 371, 377, 55 N. W. 547, 549; 13 Am Jur., Corp., § 480.

Railway Co. v. *System Federation No. 40,* 300 U. S. 515. There the Court specifically rejected the Company's contention that Section 2, Fourth of the Railway Labor Act required "that a representative be selected by the votes of a majority of eligible voters" and held that the political rule "requiring only the consent of the specified majority of those participating in the election" was intended by the statute (300 U. S. at 560).[7]

The Board and the courts have uniformly applied the principle of the *Virginian Railway* case in cases arising under the National Labor Relations Act, as the court below observed (R. 49). *National Labor Relations Board* v. *Central Dispensary and Emergency Hospital,* 145 F. 2d 852, 853 (App. D. C.), certiorari denied February 26, 1945, No. 819, last Term; *New York Handkerchief Mfg. Co.* v. *National Labor Relations Board,* 114 F. 2d 144, 148–149 (C. C. A. 7), certiorari denied, 311 U. S. 704; *National Labor Relations Board* v. *National Mineral Co.,* 134 F. 2d 424, 426–428 (C. C. A. 7), certiorari denied, 320 U. S. 753; *National Labor Relations Board* v. *Whittier*

[7] The political election rule makes no distinction based upon the number of participants. See *Carroll County* v. *Smith,* 111 U. S. 556, cited by the Court in the *Virginian Railway* opinion, 300 U. S. at 560, and *St. Joseph Township* v. *Rogers,* 16 Wall. 644. Thus the court below properly held (R. 49) that the circumstance that in the *Virginian Railway* case a majority of those eligible to vote participated in the election affords no basis for distinguishing that case from the instant case.

Mills Co., 111 F. 2d 474, 477–478 (C. C. A. 5); *Marlin-Rockwell Corp.* v. *National Labor Relations Board*, 116 F. 2d 586, 588 (C. C. A. 2), certiorari denied 313 U. S. 594; *Matter of Western Foundry Co.*, 42 N. L. R. B. 302; *Matter of Spring City Foundry*, 11 N. L. R. B. 1286; *Matter of R. C. A. Mfg. Co., Inc.*, 2 N. L. R. B., 11 N. L. R. B. 159, 173–179. There are no contrary decisions.

In its decision herein the Board stated that "where less than a majority of eligible employees participate in Board elections a question as to the representative character of the vote is raised" (R. 3). Following its established policy in such cases the Board examined the record to determine the question. The participation in the two elections represented 49 percent and 40 percent, respectively, of the electorate (R. 34, 37). The Board concluded that "the facts disclosed by this record convince us that the vote herein was substantial and representative * * *" (R. 3). Petitioner argues that the Board's conclusion to this effect was "arbitrary" and therefore improper because the Board failed to conduct an "additional investigation" and to adduce additional "evidence from which to conclude that the minority election showed the wishes of the majority" (Br. pp. 17–18). But the purpose of the Board's investigation to determine the representative character of a minority vote obviously is not to establish the *actual* wishes of the majority.

Such a procedure would be a negation of the very principle enunciated in the *Virginian Railway* decision. The purpose of the Board's investigation is simply to determine whether "all of those eligible were given adequate opportunity to vote" and whether a "substantial" and "representative number of eligible employees [did] participate" (National Labor Relations Board, *Eighth Annual Report* (1943), p. 52). See also *Sixth Annual Report* (1941) p. 62, and *Ninth Annual Report* (1944), pp. 32–33. In short the Board's practice in this respect is not to apply the *Virginian Railway* principle blindly and issue certifications automatically upon the basis of elections in which only a minority participates, but as a matter of discretion to limit the application of the principle to cases in which the participation in the election is sufficiently substantial and representative to warrant the presumption that "those who do not participate * * * 'assent to the expressed will of the majority of those voting'" (The *Virginian Railway* case, 300 U. S. at 560).[8] We submit that the Board's administrative practice in this respect is reasonable and proper (the *Central Dispensary*

[8] The Board does not always consider the presumption warranted. For example in *Matter of Weinberger Sales Co., Inc.*, 28 N. L. R. B. 154 (54 out of 540 eligibles voted); *Matter of S. A. Kendall, Jr.*, 41 N. L. R. B. 395, 397 (1 out of 3 eligibles voted); and *Matter of Bernard Gold and Jack Wasserman*, 54 N. L. R. B. 869, 55 N. L. R. B. 591 (1 out of 2 eligibles voted), the Board refused to issue certifications on the ground that the elections were not representative.

case, *supra*, 145 F. 2d at 854) and that it was properly applied in the instant case, as the court below held (R. 49–52).

2. Petitioner's contention that the Board exceeded its authority in dropping the choice "neither" from the ballot in the run-off election is without merit and, in any event, does not present a question warranting review by this Court. Petitioner does not question the propriety of the Board's practice of conducting run-off elections where original elections are inconclusive. Petitioner's sole contention as to this phase of the case is that the Act compels the Board in conducting run-off elections to afford the employees opportunity to vote *against* the labor organizations appearing on the ballot even where, as in the instant case, the choice "neither" received the lowest number of votes in the first election. We submit that the Board's action in the present case was reasonable on its face. As the court below declared, "It could not be unreasonable to drop in the run-off the choice which had received the lowest number of votes" (R. 52). Indeed, far from being arbitrary, the Board's solution of the representation question in the present case and its use generally of the run-off election device as part of its procedure under Section 9 (c) of the Act is the result of the Board's wide experience and the exercise of its considered judgment in dealing with questions concerning employee representa-

tion. Where, as here, two unions participate in an election the Board regularly provides a space on the ballot for each union and also a space in which the employee may register his vote for "neither."[9] In such cases where the choice "neither" receives a majority of the votes cast the Board will generally dismiss the petition on the theory that the employees have indicated that they do not then wish to avail themselves of the statutory collective bargaining process.[10] Where, as here, the results of the election are inconclusive in that no single choice receives a majority of the votes cast but the two unions together poll a majority of the votes cast with the choice "neither" finishing in third place, the Board will, upon proper request by one of the unions, conduct a run-off election between the two unions, omitting the choice "neither" from the ballot.

The Board's policy in this respect is the outgrowth of its practical experience. Its earlier practice where two unions were involved in an inconclusive election was to provide a run-off election for or against the organization receiving the larger number of votes in the first election. *Matter of Coos Bay Lumber Company,* 16 N. L. R. B. 476, 477–480; National Labor Rela-

[9] National Labor Relations Board, *Third Annual Report* (1938), p. 145; *Ninth Annual Report* (1944), p. 31; *Matter of Interlake Iron Corporation,* 4 N. L. R. B. 55, 60–62.

[10] *Matter of The Colorado Fuel & Iron Corporation,* 30 N. L. R. B. 210.

tions Board, *Third Annual Report* (1938), pp. 149-150.[11] The Board's now settled practice of dropping the choice "neither" from the run-off election ballot, under the circumstances present here, was adopted in 1940, *Matter of R. K. LeBlond Machine Tool Co.*, 22 N. L. R. B. 465; National Labor Relations Board, *Fifth Annual Report* (1940), p. 60. This policy is based upon the Board's considered judgment that where in an original election the combined vote for the two labor organizations involved constitutes a majority of the votes cast, although neither of the labor organizations alone receives a majority of the votes, the majority of the employees have thereby expressed a desire to bargain collectively through some representative (the *LeBlond* case, *supra*, at p. 468). And since the declared policy of the Act is to encourage "the practice and procedure of collective bargaining" (the Act, Sec. 1) it follows that the purpose of the statute may reasonably be served in such a suitation by

[11] Where more than two organizations were involved in an inconclusive election the Board's former policy was to conduct successive run-off elections, omitting each time the organization receiving the smallest number of votes in the previous election, until a majority of the votes was cast for one of the remaining organizations or for "neither" or "none." *Matter of Aluminum Company of America*, 12 N. L. R. B. 237, 239; National Labor Relations Board, *Fourth Annual Report* (1939), pp. 80–81. The Board's present practice is to conduct only one run-off election. National Labor Relations Board, *Eighth Annual Report* (1943), p. 51.

affording the employees a further opportunity to agree upon a common representative. It is the Board's view that at least "any doubt should be resolved in favor of the presumption which is more likely to result in the choice of some collective representative" (the *LeBlond* case, *supra*, at pp. 468–469). "The objective of a run-off election is to permit a further opportunity for the selection of a representative and thus prevent the small number of employees who desire no representation from thwarting the wishes of the great majority who do desire collective bargaining" (*id.*). And where, as in the instant case, the question of whether the employees desire to avail themselves of the collective bargaining process provided by the Act has been answered unmistakably in the affirmative in the first election,[12] it is not unreasonable to "omit from the run-off ballot opportunity to vote again on that question" (*id.*).

The Board does not insist that its solution of the representation question herein is the only reasonable solution which could have been developed.[13]

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[12] Cf. *International Brotherhood of Electrical Workers* v. *National Labor Relations Board*, 105 F. 2d 598, 599, 600 (C. C. A. 6), reversed on other grounds, 308 U. S. 413.

[13] The Board necessarily continues to weigh the merits of policy rulings such as those here involved in order to keep its policies abreast of the realities which experience and changing circumstances bring to light. Since the elections herein were held the Board in re-examining its run-off election policy with a view to its practicality held a public hearing in August 1943, at which it solicited and heard the views

Nor does it contend that the solution suggested by petitioner (Br. p. 19) is entirely unreasonable.[14] The decision, however, was one for the Board to make in the exercise of its "wide discretion in determining the procedure necessary to insure the fair and free choice of bargaining representatives by employees" (*Southern Steamship*

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of interested employers and labor organizations. National Labor Relations Board, *Eighth Annual Report* (1943), p. 51. Thereafter the Board codified in its Rules and Regulations its practice with respect to run-off elections. *Id.* pp. 51, 227–228; National Labor Relations Board, *Rules and Regulations*, Ser. 3, Art. III, Sec. 11. While the new rule reflects certain changes of policy, insofar as its application would affect the various interests involved in the situation presented by the instant case it does not differ in any material respect from the practice followed at the time the run-off election herein was ordered.

[14] Petitioner's reliance upon *International Brotherhood of Electrical Workers* v. *National Labor Relations Board*, 105 F. 2d 598 (C. C. A. 6), reversed on other grounds, 308 U. S. 413, however, is misplaced. There the Board followed its earlier practice (*supra*, p. 12) of dropping from the ballot in the run-off election the union which had received the smaller number of votes in the first election. The court, in holding this action of the Board improper, in effect held that the Board should have conducted the run-off election between the two unions, which is precisely what the Board did in the instant case. The court declared that if the majority voted *against* the single candidate on the run-off ballot "nothing has been accomplished. No selection of representatives has been made and collective bargaining falls notwithstanding that in the first election * * * [the majority of the] voters indicated their desire for collective bargaining. The purpose of the election was to select, not to reject, representatives" (105 F. 2d at 600).

Co. v. *National Labor Relations Board,* 316 U. S. 31, 37). That other methods of dealing with the problem may have merit is not to say that the means adopted by the Board in this case were unreasonable and therefore represent an abuse of the Board's discretion. *National Labor Relations Board* v. *Waterman Steamship Corp.,* 309 U. S. 206, 226; *National Labor Relations Board* v. *Falk Corp.,* 308 U. S. 453, 458; *Phelps Dodge Corp.* v. *National Labor Relations Board,* 313 U. S. 177, 194–196.

CONCLUSION

The decision of the court below is correct and there is neither a conflict of decisions nor any important question warranting review. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

HUGH B. COX,
Acting Solicitor General.

ALVIN J. ROCKWELL,
General Counsel,

RUTH WEYAND,
MARCEL MALLET-PREVOST,
Attorneys,
National Labor Relations Board.

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